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Mr. Justice Brennan After Five Years

DANIEL M. BERMAN*

IT IS NOW A LITTLE MORE THEN FIVE YEARS since William Joseph Brennan, Jr. became an Associate Justice of the United States Supreme Court. Only two of his colleagues—Charles Evans Whittaker and Potter Stewart—have less seniority. Yet this issue of the CATHOLIC UNIVERSITY OF AMERICA LAW REVIEW is devoted to Justice Brennan in the belief that he has already made a measurable contribution to the development of American law, and in the expectation that his future work will represent a development, rather than an abandonment, of the tendencies he has manifested so far.

This expectation is reasonable, since Brennan's intellectual history has been characterized by a high degree of consistency. Both on the United States Supreme Court and on the New Jersey Supreme Court (where he served for almost five years) he almost unfailingly revealed the fundamental attitudes of a judicial liberal: a desire to protect the rights of the accused rather than to expand the powers of the police; a willingness to employ judicial power to repel attacks on the dignity and freedom of the individual; and a preference for liberty over order.

With Brennan's appointment, President Eisenhower unwittingly effected something of a revolution on the Supreme Court. When Eisenhower assumed the Presidency in 1953, only two of the Justices—Hugo L. Black and William O. Douglas—were exponents of liberal doctrine. Little could this impotent minority of chronic dissenters anticipate that within three years a Republican President would have given them *two* allies—Warren as Chief Justice and Brennan as Associate Justice—and put them only a single vote away from control of the Court. And the one additional vote they needed could often be obtained, since the five remaining Justices were by no means a monolithic group. The result was a series of spectacular victories in cases like *Jencks*, *Nelson*, *Yates*, *Watkins*, and *Sweezy*.

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But almost never could a majority be pasted together to support an opinion laying down any far-reaching principle of constitutional law. The typical liberal victory of 1957 did not involve an interpretation of the Constitution at all, but rather the construction of a statute. The holding was narrow and even technical. Congress could alter it, or a later Court could retreat from it without embarrassment.

Such an approach was far less uncongenial to Brennan than it was to Black, Douglas, and Warren. Brennan's position, in fact, became increasingly distinguishable from that of his three liberal colleagues as he made clear his positive preference for the narrowly based decision. Not surprisingly, he did not accept Black's view that the protections of the first amendment are absolute, or his theory that the fourteenth amendment applies the entire Bill of Rights to the States.

These were major disagreements, putting Brennan's legal philosophy considerably to the right of Black's. Yet the two Justices seldom seemed as far apart as they really were, for more often than not they reached the same destination, albeit by quite different routes. As Black, for example, was asking for acceptance of the literal wording of the first amendment, Brennan often was using the balancing technique only to emerge with results no less favorable to the individual than those achieved by his senior colleague. As Black was urging acceptance of the total incorporation theory, Brennan was interpreting the fourteenth amendment according to the Cardozo-Frankfurter selective approach, but pressing the Court all the while to select more and more.

It is still too early to predict whether Brennan will always content himself with employing essentially conservative judicial formulas to achieve liberal results, or whether he will eventually choose to make a more lasting contribution to constitutional law. If the past is any indication, he will not lack for heavyhanded advice as he struggles with the intellectual dilemmas that will confront him in the years to come, and after he makes his choices there will be an overabundance of intensely personal criticism. But he will never be swayed, except by the logic of an argument.

Not that denunciation does not disturb him. He was deeply troubled at the time of his nomination to the Supreme Court when he was attacked by McCarthyites (who considered him soft on Communism), by bigots (who could not abide the thought of a Catholic on the Court), and even by some Catholics (who were startled by the categorical assurance he had given the Senate Judiciary Committee that "there isn't any obligation of our faith superior to [the oath of office].") And the sum total of this criticism was negligible compared with the abuse that was heaped upon him after his opinions in *Jencks* and *duPont*—and especially after it became clear to some Cantabrigians that he was not a Frankfurter man even though he had studied at Harvard Law School.